PD-1236 thru PD-1240-20
COURT OF CRIMINAL APPEALS
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Nos. PD-1236-20 through PD-1240-20

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/17/2021
DEANA WILLIAMSON, CLERK

BRIAN RAY MIDDLETON, Appellant

v.

STATE OF TEXAS, Appellee

Appeal from Liberty County
Trial Causes CR31225 through CR31227 & CR34574 & CR34752
Appeal Nos. 09-20-00014-CR through 09-20-00018-CR

* * * * *

STATE'S BRIEF ON THE MERITS

Oral Argument
Granted

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant Brian Ray Middleton.

* The trial judge was Hon. Chap B. Cain, III, Presiding Judge, 253rd District Court, Liberty County, Texas.

* Appellant was represented in the trial court by Elizabeth Coker, P.O. Box 300, Livingston, Texas 77351.

* Appellant was represented in the Court of Appeals by Tom Abbate, 2323 South Voss Street, Suite 360, Houston, Texas 77057.

* The State was represented at the 2015 guilty pleas for the first three cases by Joe Warren and Ragis Fontenot, and at the 2020 sentencing proceeding on all five cases by Kayla Herrington, each of the Liberty County District Attorney's Office, 1923 Sam Houston Street, Liberty, Texas 77575.

* Counsel for the State in the Court of Appeals by Assistant District Attorney Stephen Taylor, Liberty County 1923 Sam Houston Street, Liberty, Texas 77575.

* Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The court of appeals erred in considering all the theft prosecutions in this case—both revocations and first-time trials—as having been "prosecuted in a single criminal action." While this Court's caselaw permits cases to be implicitly consolidated into a single joint prosecution—the court of appeals pushed that concept too far in this case.

STATEMENT REGARDING ORAL ARGUMENT

The Court granted argument.

STATEMENT OF THE CASE

Appellant was placed on ten years' deferred adjudication in three theft cases.[1] While still on deferred, he was charged with two new thefts, and the State petitioned to adjudicate.[2] He pleaded true to the probation-violation allegations and guilty to the two new charging instruments.[3] At a combined sentencing hearing, all five theft victims testified,[4] and the trial court found Appellant violated his deferred adjudication probation and was guilty of the new offenses.[5] In each case, it assessed a two-year state-jail sentence, to be served consecutively.[6]

On appeal, Appellant argued that TEX. PENAL CODE § 3.03(a) prohibited stacking because the offenses were part of the same "criminal episode" prosecuted

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[1] 2 Supp. RR 6 (guilty plea on all three cases), 9 (placed on deferred in latter two cases); 3 Supp. RR 4 (placed on deferred on first case). Consistent the court reporter's designation, the State will refer to the 2015 plea proceedings as "Supp. RR," proceeded by the volume number, and to the Jan. 9, 2020 sentencing hearing as "RR." The clerk's records will be referred to by the numerical part of the trial cause number (*e.g.*, 31225-CR at __).

[2] 31225-CR at 29; 31226-CR at 18; 31227-CR at 22; 34574-CR at 2; 34752-CR at 3.

[3] The parties reference a hearing where Appellant entered open pleas of true and guilty in the pending cases, but it appears not to have been transcribed. RR 6 (summarizing the earlier hearing, "There's three trues and there's two guilties"), 8 (State asking trial court to take judicial notice of pleas of true on first three cause numbers and guilty on last two).

[4] RR 10, 23, 28, 33, 39.

[5] RR 73.

[6] RR 73.

in a "single criminal action."[7] The court of appeals agreed that, as repeated theft offenses, the cases necessarily arose out of the same "criminal episode" as that term is defined in PENAL CODE § 3.01(2). It also held that, because the revocation and guilty-plea proceedings were heard together rather than serially, they were "prosecuted in a single criminal action."[8] Consequently, it deleted the cumulation orders.[9]

WHAT IS NOT AT ISSUE

The State does not contest that Appellant's two new theft indictments were consolidated. The trial court heard Appellant's guilty pleas, recessed both cases for preparation of a presentence report, and, in a combined sentencing hearing, found Appellant guilty of both offenses and imposed sentences.[10] Consequently, these sentences should be served concurrently.

Similarly, Appellant's three original deferred adjudications were likely also consolidated as to each other. Nearly everything about the cases was done

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[7] App. COA Brief at 8-10.

[8] *Middleton v. State*, Nos. 09-20-00014-CR through 09-20-00018-CR, 2020 WL 6929642, at *3 (Tex. App.—Beaumont Nov. 25, 2020) (not designated for publication).

[9] *Id*.

[10] RR at 73; 34574-CR at 11, 14, 30; 34752-CR at 9, 25.

concurrently. They were indicted the same day.[11] Appellant pled guilty in a jointly conducted hearing.[12] Although Cause CR31225 was continued to determine restitution and his deferred-adjudication disposition occurred in a separate proceeding from the other two cases,[13] thereafter, the cases were conducted together. The State moved to revoke all three cases the same day, and following his open pleas of true, he was implicitly found guilty and sentenced in all three cases in another jointly conducted hearing.[14] To the extent Section 3.03(a) applies to cases initially deferred and then adjudicated guilty in a single proceeding,[15] the sentences on all three of these original theft offenses must be served concurrently.

The issue is whether the new can be stacked on the old.

ISSUE

> If a case at the petition-to-adjudicate stage and a defendant's subsequent similar crime at the guilt phase are heard simultaneously, are they "prosecuted in a single criminal action" such that any imposed sentences must run concurrently?

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[11] 31226-CR at 2; 31227-CR at 2.

[12] 2 Supp. RR 6.

[13] 2 Supp. RR 9-10; 3 Supp. RR 4.

[14] RR 73-74.

[15] *Nguyen v. State*, 359 S.W.3d 636, 646 (Tex. Crim. App. 2012), which required sentences in non-sex offenses imposed during a hearing on a motion to adjudicate to be served concurrently, implicitly suggests it does.

SUMMARY OF THE ARGUMENT

The court of appeals was wrong to treat a revocation and new offense as cases that had been "prosecuted in a single criminal action." That phrase appears within the context of a new docket-clearing scheme that traded simultaneous punishments for simultaneous prosecutions. As the statutory scheme bears out, offenses are "prosecuted in a single criminal action" when they are tried together. This can be done formally—through joinder of counts in one indictment or consolidation of multiple indictments—or informally by the parties treating the cases as having been formally consolidated. Regardless, the scheme envisions doing this for (and before) trial. This Court's decision in *LaPorte v. State* supports that reading. Because the original offenses had already been cleared from the docket and disposed of by a plea proceeding, it was too late to have a joint trial by the time the new offenses were committed. The court of appeals's interpretation to the contrary misreads this Court's caselaw following *LaPorte* and strays too far from the meaning of the statutory text.

ARGUMENT

1. A brief history of cumulative punishment.

In Texas, trial courts lack inherent authority to cumulate sentences; absent specific statutory authority to stack sentences, each sentence begins to run on the day sentence is pronounced.[16] The first statutory authorization for stacking was the predecessor to TEX. CODE CRIM. PROC. art. 42.08.[17] Initially, the language mandated stacked sentences when a defendant had more than one conviction. By 1911, that statute read largely as it does today, explicitly giving trial courts discretion to stack:

> When the same defendant has been convicted in two or more cases …judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction, except that in the discretion of the court, the judgment in the second and subsequent convictions may either be that the punishment shall begin when the judgment and sentence in the preceding conviction has ceased to operate, or that the punishment shall run concurrently with the other case or cases, and execution shall be accordingly.[18]

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[16] *Prince v. State*, 44 Tex. 480, 1876 WL 9123 (Tex. 1876).

[17] Act of 1879, 16th Leg. (S.B. 20), eff. July 24, 1879 (codified at Art. 800) (entire code available online at https://www.sll.texas.gov/assets/pdf/historical-statutes/1879/1879-5-code-of-criminal-procedure-of-the-state-of-texas.pdf); *see Shumaker v. State*, 10 Tex. App. 117, 117-18, 1881 WL 9507 (1881) (quoting Rev. Code Crim. Proc. art. 800); *Hammond v. State*, 465 S.W.2d 748, 752 (Tex. Crim. App. 1971) (reciting history).

[18] Act of 1919, 36th Leg., Tex. Gen. Laws, ch. 20 (S.B. 47); *see Turner v. State*, 733 S.W.2d 218, 220 & n.6 (Tex. Crim. App. 1987). Much later, it permitted stacking probationary terms, not just jail or penitentiary sentences. Act of 1987, 70th Leg., R.S., ch. 513 (H.B. 554), eff. Aug. 31, 1987.

This Court explained that the "evident" purpose of the statute was avoiding "one punishment for two offenses."[19]

This statutory authority to cumulate sentences applied to both (1) a later sentence stacked onto one the defendant had already begun to serve, and (2) simultaneously entered sentences.[20] As a practical matter, however, before the 1973 Penal Code revision, few sentences were simultaneously entered because few cases were tried together. Pleading rules prohibited joinder of multiple offenses in a single charging instrument unless they arose from the same criminal transaction.[21] While

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[19] *Culwell v. State*, 157 S.W. 765, 766 (Tex. Crim. App. 1913).

[20] *See Lillard v. State*, 17 Tex. App. 114, 119 (1884) (emphasis added):

> In providing for successive imprisonments upon different convictions, this provision of the Code is in harmony with the common law. Mr. Wharton says: "When a term of imprisonment is still unexpired, the prisoner being in custody, the proper course is to appoint the second imprisonment to begin at the expiration of the first; and a sentence to this effect is sufficiently exact. *The same order is taken when there are simultaneous convictions, the sentence prescribing that the term on the second offense is to begin on the expiration of the term assigned the first offense*." (Whart. Cr. Pl. & Pr., § 932.)

See also McCurdy v. State, 265 S.W.2d 600, 601 (Tex. Crim. App. 1954) (two simultaneously entered jail terms would be served concurrently since the trial court had "made no effort to cumulate" them); *Bristow v. State*, 267 S.W.2d 415, 416 (Tex. Crim. App. 1954) (op. on orig. submission) (same).

[21] *Vannerson v. State*, 408 S.W.2d 228 (Tex. Crim. App. 1966) (interpreting 1965 version of Art. 21.24); *see also Ex parte Siller*, 686 S.W.2d 617 (Tex. Crim. App. 1985) (interpreting general-verdict requirement as prohibiting multiple convictions from improperly joined offenses). For a time, misdemeanors seemed to be treated differently and could be joined together in a single charging instrument, tried together, and multiple convictions obtained. *Ward v. State*, 185 S.W.2d 577, 578 (Tex. Crim. App. 1945) (op. on

multiple charging instruments might be tried together by consent of the parties,[22] the defendant had a right to a separate trial on each case and, other than avoiding sequential trials, there was little benefit to him waiving this right.[23] And even if cases were tried together, only one conviction could be obtained from the same criminal transaction under the "carving doctrine."[24]

2. Mandatory concurrent sentencing is part of an incentive scheme. [25]

Onto this existing legal landscape, the Legislature's 1973 Penal Code and Code of Criminal Procedure Revision created a system of incentives for

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orig. submission); *Blackwell v. State*, 244 S.W. 532, 532 (Tex. Crim. App. 1922); *Gould v. State*, 147 S.W. 247, 248 (Tex. Crim. App. 1912) (quoting Bishop's New Criminal Procedure as permitting the practice of joining legally distinct but "petty" offenses to both "protect[] the accused from the overburden of needless trials" and "sav[e] the courts from being blocked by them, to the utter suspension of public justice.").

[22] *See, e.g.*, *Alexander v. State*, 499 S.W.2d 144, 145 (Tex. Crim. App. 1973) (observing that guilty plea to property crime against one victim and not guilty plea to a robbery of another victim were tried together by agreement of the parties).

[23] *See White v. State*, 495 S.W.2d 903, 905 (Tex. Crim. App. 1973) (whether to waive right to separate trials on each case was matter of defense trial strategy and didn't require the judge to admonish defendant on consequence of joint trial).

[24] *Ex parte McWilliams*, 634 S.W.2d 815, 823-24 (Tex. Crim. App. 1980) (op. on reh'g) (abandoning the doctrine); *Ellis v. State*, 502 S.W.2d 146, 147 (Tex. Crim. App. 1973) (applying doctrine to separate indictments); *Crawford v. State*, 19 S.W. 766, 767 (Tex. App. 1892) ("Where two or more felonies are charged in the same indictment, the presumption is they are parts of the same transaction, and are to be sustained by the same evidence; and while they all may be submitted to a jury, there can be but one conviction.").

[25] This larger context is relevant because in interpreting a statute, courts do not focus exclusively on a discrete provision but consider the greater context of an act in which a provision was passed. *See Watkins v. State*, 619 S.W.3d 265, 272 (Tex. Crim. App. 2021). Likewise, a statute's history—how its enactment repealed or amended other statutes

simultaneous resolution (and simultaneous punishment) of related cases.[26] A key provision of that system was the statute at issue here—Penal Code § 3.03, which (other than an exception for certain offenses added later) read then as it does now:

> When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, sentence for each offense for which he has been found guilty shall be pronounced…[and the] sentences shall run concurrently.[27]

Section 3.03 was located in the central part of the scheme: a new penal code chapter entitled "Multiple Prosecutions." This collection of statutes permitted the State to prosecute multiple cases from the "same criminal episode" against the same defendant at the same time.[28] Instead of informal agreements between the parties to

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(distinct from *legislative* history)—forms part of the context to consider. *Timmins v. State*, 601 S.W.3d 345, 354 & n.50 (Tex. Crim. App. 2020) (citing Antonin Scalia & Bryan Garner, READING LAW: The Interpretation of Legal Texas 256 (2012)).

[26] "The purpose of [§ 3.03] appears to be convenience and efficiency, permitting one trial on the joined counts, and treating the separate offenses as one for sentencing purposes." *Haliburton v. State*, 578 S.W.2d 726, 729 (Tex. Crim. App. 1979). *LaPorte v. State* also recognized Ch. 3's important balancing of incentives: the State could clear cases and obtain multiple convictions and defendants could trade the cost of a multi-offense trial for the assurance of concurrent sentencing and avoiding "a string of trials." 840 S.W.2d 412, 414 (Tex. Crim. App. 1992), *overruled on other grounds by Ex parte Carter*, 521 S.W.3d 344, 347 (Tex. Crim. App. 2017).

[27] Act of 1973, 63rd Leg., R.S., ch. 399 (S.B. 34), eff. Jan. 1, 1974 (currently codified in TEX. PENAL CODE § 3.03(a)). Later, the Legislature added § 3.03(b), which set out an exception to mandatory concurrent sentences initially for intoxication manslaughter and later for several other offenses. Act of 1995, 74th Leg., R.S., ch. 596 (H.B. 93), eff. Sept. 1, 1995.

[28] Same criminal episode offenses were initially limited only to "the repeated commission of any one offense defined in Title 7 of this code (Offenses Against Property)." Act of

hear separate charging instruments at one time, express provision was made for a formal procedure: pretrial written notice of consolidation.[29] Statutory pleading requirements were amended to expressly permit the pleading of multiple offenses (within separate counts) in a single indictment.[30] When multiple offenses were

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1973, 63rd Leg., R.S., ch. 399 (S.B. 34), eff. Jan. 1, 1974 (codified in Penal Code § 3.01). After this Court in 1980 jettisoned the carving doctrine in *Ex parte McWilliams*, the 1987 Legislature expanded the definition of "criminal episode" to its current definition:

> the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:
>
> (1) the offense are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
>
> (2) the offenses are the repeated commission of the same or similar offenses."

Act of May 1987, 70th Leg., R.S., ch. 387 (H.B. 684) (eff. Sept. 1, 1987) (currently codified in TEX. PENAL CODE § 3.01(2)). While the carving doctrine was still valid, it would have prohibited multiple convictions for offenses defined by 3.01(1), but not 3.01(2).

[29] Act May 1973, 63rd Leg., R.S., ch. 399 (S.B. 34) (creating TEX. PENAL CODE § 3.02).

[30] Act May 1973, 63rd Leg., R.S., ch. 399 (S.B. 34) (amending TEX. CODE CRIM. PROC. art. 21.24 "Joinder of Certain Offenses" to its current language and removing prior restriction that charging instruments could not charge more than "one offense," interpreted by this Court in *Vannerson*, 408 S.W.2d 228, to mean transaction).

The statutory double-jeopardy provision was also amended to accommodate these expanded pleadings by providing a special plea if the State brought a new case that had already been resolved as part of a formally consolidated prosecution (or one that should have been formally consolidated). *Id*. (codified, then as now, in Art. 27.05) ("A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution [ended in acquittal, conviction, etc.]."). The "should have been consolidated" language of Art. 27.05 could be read as barring later prosecutions of offenses that the State could have consolidated with an earlier prosecution but declined to. But as this Court recognized in *Stevens v. State*, 667 S.W.2d 534, 538 (Tex. Crim. App. 1984), the Legislature rejected mandatory consolidation and joinder.

joined in a single indictment or consolidated in multiple ones and tried together, the jury would be asked for a verdict on each offense.[31] The first sentence of § 3.03 allowed the State to obtain multiple convictions from these cases. Under the remainder of §§ 3.03 and 3.04, if the defendant acquiesced to consolidation or joinder and didn't ask to sever the cases, he got concurrent sentences.[32] And if a case had to be retried, the State couldn't pile on new offenses that it didn't join or consolidate the first time.[33]

Under such a scheme, it is at the very least odd that the Legislature would ever insist on concurrent sentencing when a probationer commits another offense just like the one the judge put him on probation for, just because the trial judge heard the revocation with the new offense. It borders on the absurd that the Legislature would trade the trial judge's ability to assess distinct punishments on multiple offenses for the paltry benefit of clearing a probation revocation from the docket.[34]

Consequently, this language should be read as also barring offenses that were not formally consolidated but were treated that way by the parties—*i.e.*, the case has already been part of a joint trial.

[31] Act May 1973, 63rd Leg., R.S., ch. 399, at p. 169 (S.B. 34) (adding TEX. CODE CRIM. PROC. subsection (c) to art. 37.07, § 1) (language identical to current art. 37.07, § 1(c)).

[32] Act May 1973, 63rd Leg., R.S., ch. 399 (S.B. 34).

[33] *Id.* (then, as now, codified in Section 3.02(c)).

[34] The State doesn't even truly obtain the benefit of multiple convictions because the situation of joint-motion-to-adjudicate-and-new-offense hearings are only likely to occur in repeated offenses, not same transaction offenses. And for those offenses—which the

3. In this scheme, "prosecuted in a single criminal action" requires that the cases be consolidated, even informally, by the time of trial.

Under a proper textual analysis, Appellant's motion-to-adjudicate cases were not "prosecuted in a single action" with his cases set for trial. In the Chapter 3 scheme, this phrase first appears in § 3.02(a), which provides that cases that arise out of the same criminal action can be "prosecuted in a single action." Section 3.02(b) then states: "When a single criminal action is based on more than one charging instrument within the jurisdiction of the trial court, the state shall file written notice of the action not less than 30 days prior to the trial." This suggests two ways cases become "a single criminal action": either they are joined in the same charging instrument or consolidated in multiple ones. The phrase "written notice of the action" underscores that the consolidated cases become the "action." And there is a time frame for inception of the action, whether by joinder or consolidation. Joinder obviously occurs at the time of indictment (or amendment), and consolidation, formally at least, is required 30 days before trial.

The State's failure to give written notice doesn't mean that cases have not been consolidated. After initially suggesting, in *Caughorn v. State*, that lack of

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carving doctrine didn't apply to—the State was already able to obtain multiple convictions for even before Chapter 3 was added.

written notice *did* have such an implication, this Court reversed course in *LaPorte*.[35] The trial court in *LaPorte* had ordered consecutive sentences following a joint jury trial on separate indictments that had never been formally consolidated under § 3.02(b). This Court held that the sentences had to be served concurrently. *LaPorte* explained that formal notice can be waived by the defendant; "noncompliance with the notice provision does not take the proceeding out of Chapter 3 and somehow change it from a single criminal action involving consolidation of 'same criminal episode' offenses into a non-Chapter 3 joinder trial."[36]

But, importantly, eliminating a requirement of formal written notice of consolidation doesn't eliminate a requirement that the cases be consolidated. The parties must still have treated the cases as if formal notice had been made. This did not happen—and could not have—in the instant case.

Consolidation in the typical sense, and as it is used in Chapter 3, means consolidation for trial.[37] Indeed, Section 3.03(a) is frequently described in terms of

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[35] *Caughorn v. State*, 549 S.W.2d 196, 197 (Tex. Crim. App. 1977), *overruled by LaPorte*, 840 S.W.2d at 414.

[36] *LaPorte*, 840 S.W.2d at 414.

[37] *See* TEX. PENAL CODE § 3.02(c) (barring the consolidation of not-originally-consolidated offenses on retrial); TEX. CODE CRIM. PROC. art. 37.07, § 1(c) (requiring multiple verdicts if two or more offenses are consolidated for trial under Penal Code Chapter 3); *Id*. art. 27.05 (providing a special plea if there was a prior prosecution for a

cases heard together for trial.[38] *LaPorte* explained that "a defendant is prosecuted in 'a single criminal action' whenever allegations and evidence of more than one offense arising out of the same criminal episode . . . are presented in a single trial or plea proceeding."[39] The hallmark of a criminal action is its trial—whether contested or resolved through a plea proceeding.[40] It is the setting where the accused's criminal liability is determined. So, under the scheme created in Chapter 3 and consistent with *LaPorte*, if cases are not already joined at their inception, they must at least have been consolidated by the time of trial.

Here, it was impossible to consolidate Appellant's old and new cases since at the time the old cases were disposed of by deferred adjudication, Appellant had not even committed the new offenses. Whatever the precise deadlines for

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different offense arising out of the same criminal episode that "was or should have been consolidated into one trial…").

[38] *See, e.g., Sullivan v. State*, 387 S.W.3d 649, 651 (Tex. Crim. App. 2013) ("When offenses [arising from the same criminal episode] are tried together pursuant to chapter three, the sentences must be concurrent unless a specific exception within chapter three provides otherwise.").

[39] *LaPorte*, 840 S.W.2d at 414-15; *Ex parte Carter*, 521 S.W.3d at 347 (plurality reaffirming this holding).

[40] *See Murray v. State*, 302 S.W.3d 874, 880 (Tex. Crim. App. 2009) (determining that guilty plea proceeding was a "trial" for purposes of statute giving district court jurisdiction over misdemeanor offenses included in the indictment "[u]pon trial of a felony case.").

consolidation,[41] years after the trial or plea proceeding is too late to consolidate cases into a single prosecution.[42] To use *LaPorte*'s terminology, instead of a consolidated trial, the trial court in Appellant's cases had a non-Chapter 3 joinder hearing to adjudicate the deferred cases and try the new ones. No formal consolidation notice was ever filed; nor did the parties indicate they considered the cases consolidated under Chapter 3.[43]

Even if a revocation is a "trial" in some sense and two motions-to-adjudicate could be consolidated for the first time at that stage, Appellant's two sets of cases did not have enough in common for them to have been considered a unified, single *anything*. The phrasing is "single criminal action," not merely "during a joint hearing." To constitute a unified prosecution, there should be some basic shared procedural aspects. Here, the issue at stake in the new offenses was Appellant's guilt;

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[41] *Robbins v. State*, 914 S.W.2d 582, 584 (Tex. Crim. App. 1996), which considered cases to be consolidated for the first time *during* a plea proceeding, suggests that the time for consolidation may run at least into the beginning of the trial proceeding itself.

[42] *See Thornton v. State*, 986 S.W.2d 615, 617-18 (Tex. Crim. App. 1999) (defendant's motion to sever must be made prior to guilt phase of trial).

[43] The parties clearly articulated to the trial court the different procedural posture of the two sets of cases, and Appellant never objected when the trial court stated there was no impediment to consecutive sentencing under Article 42.08. RR 6-8, 73. This failure to object doesn't mean the issue was forfeited; the right at issue is characterized as waivable-only. *Ex parte McJunkins*, 954 S.W.2d 39, 41 (Tex. Crim. App. 1997) (op. on reh'g).

for the motion to adjudicate, it was not.[44] The burden of proof was different.[45] And while the factfinder was the same in Appellant's case, it could have been different because, unlike with a revocation,[46] a defendant in a new criminal case has a right to a jury. After the proceeding was over, Appellant's appellate rights would be

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[44] *See* TEX. CODE CRIM. PROC. art. 42A.108(b) ("The defendant is entitled to a hearing limited to a determination by the court of whether the court will proceed with an adjudication of guilt on the original charge."); *Ex parte Sledge*, 391 S.W.3d 104, 111 (Tex. Crim. App. 2013) ("Any subsequent proceeding for purposes of deciding whether to proceed to adjudication does not involve a revisitation of the initial guilt-substantiation determination."). With a deferred adjudication, "further proceedings" are "defer[red]." TEX. CODE CRIM. PROC. art. 42A.101(a). This Court has characterized this process as "temporarily still[ing]" "the movement of the course of developments in a criminal action." *McIntyre v. State*, 587 S.W.2d 413, 417 (Tex. Crim. App. 1979). Should the deferred adjudication probationer fail to abide by the terms of his probation, "the movement in a criminal action continues with the normal incidents of trial." *See also Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004) ("If he fails [at his deferred adjudication probation], the case continues on as if it had never been interrupted."); *Cobb v. State*, 851 S.W.2d 871, 874 (Tex. Crim. App. 1993) (revocation is an "extension" of trial court's sentencing power and thus probation conditions need not be proven). While descriptive of the process in general, this characterization does not make the motion-to-adjudicate hearing a mere continuation of the original guilty plea proceeding. A deferred adjudication is a disposition of the case, one that can include the possibility of appeal. *Kirk v. State*, 942 S.W.2d 624, 625 (Tex. Crim. App. 1997). Other notable events will have occurred in the interval, not the least of which is a violation of the defendant's probation. Moreover, it is only "[a]fter an adjudication of guilt" that "all proceedings…continue as if the adjudication of guilt had not been deferred." TEX. CODE CRIM. PROC. art. 42A.110(a). Even this does not imply that the trial court must treat the grant and violation of probation as never having occurred.

[45] *Hacker v. State*, 389 S.W.3d 860, 864–65 (Tex. Crim. App. 2013).

[46] *Hood v. State*, 458 S.W.2d 662, 662 (Tex. Crim. App. 1970).

different as to each set of cases.[47] These two sets of cases lacked the indicia of anything resembling the essence of a consolidated prosecution—one unified lawsuit.

a. Post-*LaPorte* caselaw does not suggest otherwise.

Although never fully articulated, this Court's caselaw is consistent with the idea that, where there is no formal consolidation, the outward signs of the proceedings must demonstrate implicit consolidation for simultaneous prosecution to have occurred. After *LaPorte*, this Court, in *Duran v. State*, considered an appeal of two regular probation revocations and held that the record did not show that a single criminal action occurred.[48] The *per curiam* opinion did not explain why. Judge Baird's concurrence, however, lends support to the idea that consolidation must occur early for multiple prosecutions to become one. His side opinion indicated the motions to revoke were conducted jointly but the original guilty plea proceedings may not have been; Duran had waived a court reporter and the record was otherwise silent on the matter.[49] Judge Baird explained that "to be entitled to concurrent sentences under § 3.03 appellant must establish that the offenses were consolidated

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[47] *See Wright v. State*, 506 S.W.3d 478, 481 (Tex. Crim. App. 2016) (attack on original conviction in an appeal from revocation proceedings is generally not allowed).

[48] 844 S.W.2d 745, 746 (Tex. Crim. App. 1992).

[49] *Id.* at 748 (Baird, J., concurring).

at the time of his pleas as well as the hearings on the motions to revoke his probation."[50]

In *Ex parte Pharr*, the State avoided concurrent sentencing by having Pharr's two capital murder cases heard immediately after one another.[51] The opinion, which seemed to create a rather mechanical way of determining whether cases were "prosecuted in the same criminal action," was very short. But going to these lengths also foreclosed any claim of implicit consolidation.

In 1996, *Robbins v. State* indicated that some separation in the hearings and delay in consolidation was tolerable in a single criminal action. In a *per curiam* opinion, the *Robbins* court held that hearing a defendant's guilty pleas separately and then completing sentencing together *does* constitute a single proceeding because "[a] plea proceeding is not complete until punishment has been assessed." *Robbins* differed from *Ex parte Pharr* because one case was not fully completed when the next one started.[52] Perhaps reading the outward signs as a totality, the *Robbins* Court

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[50] *Id.*

[51] 897 S.W.2d 795, 796 (Tex. Crim. App. 1995) (calling and completing each case before calling the next does not constitute a single trial or plea proceeding and, thus, the sentences can be stacked).

[52] 914 S.W.2d at 584. Judge Baird dissented for the reasons he gave in *Duran. Id.*

remarked, "the consolidated punishment hearing defeated the State's and trial court's attempts to comply with the provisions of § 3.03, of the Penal Code."

b. The court of appeals was wrong to extend *Robbins* to these facts.

The court of appeals mistakenly relied on *Robbins* to hold that all Appellant's cases had been prosecuted as one.[53] Robbins pled guilty to two indictments at separate hearings and, before the trial court accepted a plea or assessed punishment in either case, the cases were combined for punishment, the pleas were accepted, and consecutive sentences assessed.[54] This Court invalidated the cumulation order. Although the cases had technically begun separately, this had no legal significance; because Robbins's guilty pleas made the plea and punishment phases a unitary proceeding,[55] combining the cases for "punishment" essentially meant that the trial had still been held jointly. Stated differently, the sentences had to be served concurrently because, at least before the end of trial on the matter of his guilt, the prosecutions had been informally consolidated.

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[53] *Middleton*, 2020 WL 6929642, at *3.

[54] *Robbins*, 914 S.W.2d at 583.

[55] *See State v. Davis*, 349 S.W.3d 535, 540 (Tex. Crim. App. 2011) (guilty plea transforms proceeding into "'unitary trial' to determine the remaining issue of punishment"); *see also Barfield v. State*, 63 S.W.3d 446, 449 (Tex. Crim. App. 2001) (bifurcation applicable only to pleas of not guilty before a jury).

The same could not be said of the hearings here, which were held years apart and after the first set of cases had already been through a "trial" and been disposed of by an appealable order. *Robbins*' observation that "[a] plea proceeding is not complete until punishment has been assessed" did not fit here, and the court of appeals should not have extended it beyond Robbins' facts.[56] Considering *LaPorte*'s definition of "a single criminal action" as "a single trial or plea proceeding,"[57] application of Section 3.03 to these circumstances departs even further from the statutory language. It essentially substitutes "hearing" for the Legislature's word, "action," which generally means "lawsuit."[58]

Through-out the 1973 Penal-Code-and-Code-of-Criminal-Procedure Revision, "criminal action" has all the characteristics of a lawsuit or a criminal case on the court's docket—not a mere hearing. It "is prosecuted in the name of the State of Texas against the accused" and "conducted" by someone acting under authority

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[56] *Middleton*, 2020 WL 6929642, at *3 (quoting *Robbins*, 914 S.W.2d at 583-84).

[57] *Ex parte Pharr*, 897 S.W.2d at 796; *LaPorte*, 840 S.W.2d at 414.

[58] "Action," BLACK'S LAW DICTIONARY 28 (6th ed. 1990) ("Term in its usual legal sense means a lawsuit brought in a court….Criminal actions are such as are instituted by the sovereign power (*i.e.* government), for the purpose of punishing or preventing offenses against the public.") (also including definitions for "civil action" and "class action").

of the State.[59] Its primary pleading is an indictment or information.[60] It can be continued by operation of law if not tried by the end of the term of court.[61] It can be continued by agreement of the parties or on motion by one.[62] It can be appealed.[63] It must have a general verdict.[64] It has a judgment that can be reversed on appeal.[65]

Meaning ought to be restored to the Legislature's choice of the phrase "single criminal action." It should not force the State or trial judge to resort to starting and finishing each separate case just to override a too broadly implied consolidation by inaction.[66]

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[59] TEX. CODE CRIM. PROC. art. 3.02. Interestingly, a prior version of the Penal Code defined the term: "A 'criminal action' means the whole or any part of the procedure which the law provides for bringing offenders to justice; and the terms 'prosecution' and 'accusation' are used in the same sense." Act of 1925, 39th Leg., R.S. (S.B. 7) (codified in TEX. PENAL CODE art. 24 (1925)).

[60] TEX. CODE CRIM. PROC. art. 27.01.

[61] *Id*. art. 29.01.

[62] *Id*. arts. 29.02, 29.03.

[63] *Id*. art. 36.19.

[64] *Id*. art. 37.07.

[65] *Id*. art. 44.25.

[66] *See Kuykendall v. State*, 611 S.W.3d 625, 628 (Tex. Crim. App. 2020) (rejecting "the notion that the statute permits the 'allowable unit of prosecution' for failing to appear to turn on an administrative decision about whether to combine separate court proceedings into a single setting.").

4. Other courts intuitively rejected that these hybrid proceedings could be a single prosecution.

Other courts of appeals, both before and after *Robbins*, have rejected the idea that joint proceedings on a revocation and new offense could be considered a consolidated prosecution. In *Crider v. State*, the court of appeals held that such proceedings did not meet *LaPorte*'s definition of "single criminal action" because the straight-probation revocation did not involve allegations or evidence of commission of an offense.[67] *Rivas v. State*, quickly and without explanation, came to the same result concerning a motion to adjudicate (*i.e.*, deferred adjudication revocation) that was heard during the jury's penalty-phase deliberations on a new, but similar, offense.[68]

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[67] 848 S.W.2d 308, 309, 312 (Tex. App.—Fort Worth 1993, pet. ref'd) (judge deciding whether to revoke *straight* probation and jury deciding guilt of new offense). *Crider* also called the revocation "administrative." *Id.* This Court has since criticized the use of "administrative proceedings" to describe revocations since they are not conducted by an administrative agency but by courts using many of the procedures applicable to criminal trials. *Ex parte Doan*, 369 S.W.3d 205, 208-10 (Tex. Crim. App. 2012). Nevertheless, the differences in aim and panoply of rights underscore that the cases are not truly a single, unitary prosecution. *See also State v. Waters*, 560 S.W.3d 651, 662 (Tex. Crim. App. 2018) (not true finding concerning new offense during probation revocation will not bar, by collateral estoppel, prosecution of that new offense).

[68] Nos. 14-98-01442-CR through 14-98-01444-CR, 2001 WL 459947 (Tex. App.—Houston [14th Dist.] May 3, 2001, pet. ref'd) (not designated for publication). Although the court said earlier convictions did not arise out of the "same criminal episode" as the most recent, it is clear from its citation to *Crider* and *LaPorte* that it meant "same criminal action."

Dach v. State, which was decided after but did not cite *Robbins*, relied on Judge Baird's concurrence in *Duran* that the offense had to be consolidated at the time of the guilty-plea proceedings in concluding that a new offense was not "prosecuted in a single criminal action" with the probated case.[69] And in *In re Sanna*, the same court of appeals as in the instant case decided, albeit in a mandamus case, that a defendant did not "demonstrate that evidence of more than one offense was presented in a single proceeding" when a motion to adjudicate was heard with the trial on punishment for a new offense.[70]

5. This interpretation can be applied consistently in other contexts.

The multiple-prosecutions statute in the Controlled Substances Act has nearly identical language to Penal Code Chapter 3 and, in particular, the same "prosecuted in a single criminal action" qualification for mandatory concurrent sentences.[71]

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[69] 49 S.W.3d 490, 491 (Tex. App.—Austin 2001, no pet.) (involving *straight* probation). As in *Crider*, it is not immediately apparent why the terms of 3.03(a) would even apply to a revocation of straight probation since that is not a proceeding where the defendant is "found guilty of more than one offense." TEX. CODE CRIM. PROC. art. 3.03(a). If only *deferred-adjudication*-revocation-and-new-offense combo-trials trigger 3.03(a) concurrent sentencing, this begs the question why the Legislature would reward the failed *deferred* probationer with a new sentence that merges into his original offense and not the straight probationer. The deferred probationer may receive greater benefits at the outset, but that favorable status flips on adjudication since he must face the entire punishment range.

[70] No. 09-12-00018-CR, 2012 WL 252562 (Tex. App.—Beaumont Jan. 25, 2012) (not designated for publication).

[71] TEX. HEALTH & SAFETY CODE §§ 481.132, 481.132(d).

There is no reason to treat the meaning of this phrase any differently in the context of controlled substance offenses.[72] Requiring these kinds of cases to have been joined or consolidated before trial—that is, before disposition by guilty plea or contested trial—is entirely compatible with this multiple prosecutions scheme.

A court cost provision, TEX. CODE CRIM. PROC. art. 102.073(a), also shares similar language. It provides:

> In a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant.[73]

An exception is made for Class C offenses.[74] Although this statute is not limited to same-criminal-episode offenses, a consistent interpretation of "single criminal action" would not be absurd in the context of court costs where additional costs will

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[72] Indeed, the legislative history suggests the Legislature meant to emulate the Chapter 3 Penal Code provisions for drug offenses. *See* Bill Analysis, Act of 1991, 72nd Leg., R.S., ch. 193 (S.B. 148), eff. Sept. 1, 1991.

[73] TEX. CODE CRIM. PROC. art. 102.073(a) (court may assess each court cost or fee only once against the defendant "[i]n a single criminal action") (no express same-criminal-episode requirement). *See Hurlburt v. State*, 506 S.W.3d 199, 202 (Tex. App.—Waco 2016, no pet.) (looking to *LaPorte* and this Court's other Penal Code § 3.03 cases in interpreting art. 102.073(a)). Courts of appeals typically equate "single criminal action" with a single trial. *See, e.g.*, *Guerin v. State*, No. 02-18-00509-CR, 2019 WL 4010361, at *1 (Tex. App.—Fort Worth Aug. 26, 2019, no pet.) (not designated for publication) (striking court costs for multiple convictions tried in a single proceeding).

[74] TEX. CODE CRIM. PROC. art. 102.073(c).

almost always be generated when new cases not originally joined for trial are combined with a revocation.

6. Conclusion

The court of appeals imposed consolidated punishments without the benefit of the separate sets of cases having been consolidated, even informally, for trial. Their interpretation should be rejected because it conflicts both with how the scheme works as a whole and how this Court has interpreted it.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the court of appeals in part, and affirm the trial court's cumulation order to the extent it requires the sentence in Cause 31227 to cease to operate before the sentences in Cause 34574 and 34752 begin.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 6,212 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 14th day of May 2021, the State's Petition for Discretionary Review was served electronically on the parties below.

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